

NOT FOR PUBLICATION

SEP 14 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RICKY BERDARE CLAYBURN,

Plaintiff - Appellant,

v.

A. K. SCRIBNER; et al.,

Defendants - Appellees.

No. 05-16923

D.C. No. CV-03-06421-AWI/LJO

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted September 11, 2006 ^{**}

Before: PREGERSON, T.G. NELSON, and GRABER, Circuit Judges.

California state prisoner Ricky Berdare Clayburn appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action. We have

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), we affirm.

Before the district court, Clayburn stated that he had “started the appeal process” and requested a stay of his action so that he could complete the administrative process. A prisoner, however, must exhaust available administrative remedies *prior* to filing an action. *See McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (per curiam). Accordingly, the district court properly dismissed Clayburn’s action for failure to exhaust. *See Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (“A prisoner’s concession to nonexhaustion is a valid ground for dismissal, so long as no exception to exhaustion applies.”).

We construe the district court’s order dismissing the action to be without prejudice to refiling upon exhaustion of administrative remedies. *See id.*

AFFIRMED.